Control Services, Inc. *and* Local 32B–32J, Service Employees International Union, AFL–CIO. Cases 22–CA–17042, 22–CA–17167, 22–CA–17302, and 22–CA–17341

October 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On June 11, 1991, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Martha Arismendi, Jose Carbonell, Karen Talledo, Samuel Johnson, Maria Dias, and Domitilla Olivares because of those employees' union activities. We adopt those findings for the reasons discussed in the judge's decision, and for the additional reasons set forth below.

Concerning the discharges of Arismendi and Carbonell, we note that the testimony of the Respondent's vice president of operations, Thomas Martin, further supports the judge's finding that the Respondent's stated reason for those discharges was pretextual. Martin, who gave the instruction to terminate employees who were working under other people's names, admitted that his chief concern was whether employees had proper documentation, and that those who (like Arismendi and Carbonell) had such documentation should be permitted to continue working.

We also agree with the judge that, contrary to the Respondent's contentions, the Respondent knew of the union activities of Arismendi and Carbonell at the time of their discharges. In addition to the factors relied on by the judge to establish that knowledge, we rely on the judge's finding that Supervisor Salvatore Toppi[3] interrupted a union meeting attended by 18 to 20 people, including both Arismendi and Carbonell. The Respondent, through Toppi, thus can be charged with firsthand knowledge of the two employees' attendance at union meetings. We also rely on Arismendi's testimony that she protested an instruction by Supervisor Castellani that employees should accept work assignments in sections other than their own, by telling Castellani that the employees had been told at a union meeting that they did not have to work in other sections.[4]

Turning to the discharge of Dias, we note that Martin testified that he had instructed the Respondent's supervisors to be especially careful when meting out discipline to known union activists, such as Dias. Martin advised Supervisor Salvatoriello that ''On any of the people that we might know to be active in the union, you can go ahead and discipline but make sure you are correct, make sure it's documented.'' Despite this alleged kid-gloves treatment of known union supporters, however, Martin discharged Dias on the basis of a hearsay report, without even attempting to get her version of the incident–her allegedly going through Supervisor Bolanos' desk or papers–on which the discharge supposedly was based. He did so, moreover, even though Bolanos himself had only issued a warning to Dias concerning the incident, and had told her that the next time she would receive a 2 or 3-day suspension, and that she would be discharged after a *third* occurrence.[5]

With respect to Johnson's discharge, assertedly based on his repeated absences from work and his failure to call in to advise that he would be absent, we

[1] The Respondent has excepted to the judge's failure to recuse himself for bias. There is no merit to that exception. We have carefully reviewed the record and have found no evidence of bias on the part of the judge. *Filmation Associates*, 227 NLRB 1721 (1977), and Center for *United Labor Action*, 209 NLRB 814 (1974), cited by the Respondent, are inapposite to this case. In each of those decisions, it was necessary to remand the proceedings for a hearing on the merits, and the Board–faced with an allegation of bias on the part of the original judge–simply elected to remand to a different judge. Those authorities obviously do not require a remand when, as in this case, there is no need for a further hearing on the merits, and the judge has shown no sign of bias.

[2] We agree with the judge that the Respondent's no-solicitation and no-distribution rules were unlawful, and that Sec. 10(b) does not bar finding the violation. See *Alamo Cement Co.*, 277 NLRB 1031, 1036–1037 (1985).

In adopting the judge's finding that the Respondent had at least an informal progressive discipline policy, we rely on the testimony to that effect by Supervisors Bolanos and Ormeno. The judge evidently discredited contrary testimony by Vice President Martin and Supervisor Salvatoriello.

Contrary to the judge's statement in part II,(b), par. 5, employees Arismendi and Carbonell were instructed by the Respondent to produce papers bearing the names they had been using on the job, not their real names. Also, the events recounted in part II,(b) did not take place at an Exxon facility. These errors do not affect our decision.

[3] The Respondent, for undisclosed reasons, appears to dispute the judge's characterization of Toppi as a statutory supervisor. We find, however, that the evidence supports the judge. Arismendi testified that Toppi once gave her permission to miss work, and also gave her additional assignments when other employees were absent. Toppi did not testify. In addition, the Respondent's records characterize Toppi as a supervisor.

[4] Castellani's response—that (contrary to fact and law) the employees no longer had a union—is further evidence of the Respondent's antiunion animus, as is the Respondent's suspension of Johnson for wearing a union sticker (see below).

[5] Dias' testimony in this regard was not controverted by Bolanos.

observe that although the Respondent claims that Johnson failed to call in on several occasions, his discharge notice refers only to his failure to call in on November 1, 1990 (the day of his termination). And, as the judge remarked, a memorandum from Johnson's file concerning his termination says nothing at all about his failing to call the Respondent (although it does cite his failure to call his *supervisor*, which the Respondent does not rely on as grounds for discharge). In fact, the memorandum states that he had called and left the same message—advising that he had been to the doctor and would not be in that day—on the answering machine for almost 2 weeks. The memorandum indicates that Johnson was terminated for absenteeism and his failure to present a note from his doctor[6] Martin's failure to ask Johnson (like Dias, a known union activist) to give his side of the story is especially significant in light of Martin's stated concern that such individuals be disciplined only if the supervisor were sure of his ground.[7]

2. The judge also found that the Respondent unlawfully suspended Johnson for refusing to obey an order not to wear a sticker bearing a union message. Although the sticker said simply, ''Lose Control,'' and bore no other union identification, the judge found that it had been distributed along with a union leaflet (which bore the Union's logo) containing the same message, and thus was clearly connected to the Union's position regarding a dispute with the Respondent over working conditions. The Respondent excepts. It argues that Salvatoriello, who suspended Johnson, did not know at the time of the suspension that Johnson was wearing the sticker in support of the Union, and therefore that the suspension was lawful.

We adopt the judge's finding that Johnson's suspension was unlawful. In so doing, we note that, although the judge correctly stated that the union leaflet bore the same message as the sticker that Johnson wore, the record does not contain direct evidence that the Respondent was aware, at the time of Johnson's suspension, that the Union had distributed the leaflet[8] We nevertheless find that the record, taken as a whole, supports the inference that the sticker's union origin was known to the Respondent at the time Johnson was suspended[9] Thus, the stickers and the leaflets were distributed during a public demonstration by the gates of the Respondent's Exxon-Linden facility. The public distribution of the two documents increases the probability that the Respondent knew that the Union was the source of both. Johnson also testified that the stickers were worn by nearly all the unit employees on his shift, including Dias. That two known union activists, Johnson and Dias, wore the stickers to work makes it more likely that the Respondent would have inferred that the stickers had something to do with the Union, even if it had not known about the leaflets. Finally, Salvatoriello did not suspend Johnson on his own authority. Instead, he first called Martin and asked if he knew anything about the sticker. Martin replied that he was going to call counsel, and that Salvatoriello should call him back. When Salvatoriello did so about 15 minutes later, Martin told him to give Johnson the choice between removing the sticker and leaving the worksite. Remarkably, however—given the importance evidently attached to this event by the Respondent—apparently neither supervisor bothered to ask about either the origin of the sticker or the meaning of its message.[10] There is only one plausible explanation for the two supervisors' studied lack of curiosity over the source and meaning of Johnson's sticker: although they either knew or suspected that the sticker came from the Union, they thought that as long as they did not ask Johnson about it, they could continue to deny that they knew where it came from, and thus could pretend that their actions against Johnson were not in retaliation for his known union activity.

On the basis of the public distribution of the leaflet and sticker, the wearing of the sticker by at least two known union adherents, and the conduct of Salvatoriello and Martin on the occasion of Johnson's suspension, we infer that the Respondent knew that the message on the sticker was the Union's. Accordingly, and for the other reasons set forth in the judge's deci-

[6] The Respondent does not now contend that Johnson's failure to present a doctor's note was a basis for his discharge.

[7] In this regard, we note Salvatoriello's testimony that, on the morning of Johnson's discharge, Martin asked him to listen to the message tape on the answering machine, but that the morning's messages had already been erased. The judge discredited Salvatoriello's assertion that messages are automatically erased when the tape is rewound. Even under Salvatoriello's version, however, the circumstances surrounding Johnson's discharge cast doubt on its validity. If Salvatoriello is to be believed, Martin had expressly instructed him to document Johnson's asserted failure to call in on November 1 (presumably pursuant to Martin's alleged general exhortation to discipline known unionists only with great care). However, even though, for technical reasons, Salvatoriello was unable to secure the damning evidence, the Respondent terminated Johnson anyway, without giving him an opportunity to rebut the charge against him.

We do not rely on the judge's finding that Salvatoriello could recall no instance in which an employee was discharged for a single no-call/no-show. The question to which Salvatoriello was responding was, ''Have you ever terminated an employee for being absent one day for not coming in?'' Thus, Salvatoriello was not asked whether any employee had been terminated for failing to *call* in on a single occasion.

[8] Salvatoriello admitted that he had seen the leaflet, but testified that, to the best of his knowledge, he did not see it until after he had suspended Johnson.

[9] The Respondent, in fact, does not argue otherwise. It contends only that the language from the leaflet quoted in the judge's decision does not mention the Union. That contention, though accurate, is irrelevant. As we have noted, the Union's logo appeared (prominently) on the face of the leaflet. No one who had seen the leaflet could mistake the fact that it had emanated from the Union.

[10] The meaning of the ''Lose Control'' slogan on the sticker would have been, at best, ambiguous to anyone who had not seen the message on the leaflet.

sion, we agree with the judge that Johnson's suspension violated Section 8(a)(3) and (1).[11]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Control Services, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.[12]

[11] We note that there is no contention, or evidence, that wearing the stickers interfered with production or discipline. See *Control Services*, 303 NLRB 481, 481 (1991).

[12] We adopt the judge's recommended Order, which provides for reinstatement, with full backpay, for all six employees who were unlawfully discharged. However, in light of the Respondent's contention that Karen Talledo and Samuel Johnson engaged in a conspiracy (which it learned of only after those employees were terminated) to cause the Respondent to lose one of its contracts, we shall allow the Respondent, at compliance, to introduce any relevant evidence concerning the appropriateness of reinstatement for Talledo and Johnson, and the extent to which they are entitled to make-whole relief. See *Storer Communications*, 297 NLRB 296, 301 fn. 32 (1989).

Marguerite R. Greenfield, Esq. and *Julie Kaufman, Esq.*, for the General Counsel.
Joel Keiler, Esq., for the Respondent.
Larry Engelstein, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on February 4 and 5 and April 9 and 10, 1991. The charge in Case 22–CA–17042 was filed by the Union on May 24, 1990. The charge in Case 22–CA–17167 was filed by the Union on July 31, 1990. The charge in Case 22–CA–17302 was filed on October 12, 1990, and an amended charge in that case was filed on December 7, 1990. The charge in Case 22–CA–17341 was filed Martha Dias on November 1, 1990. The consolidated complaint was issued on January 8, 1991.

In substance the consolidated complaint alleges:

1. That on or about April 10, 1990, the Respondent at a work site at Automatic Switch in Florham Park, New Jersey, discriminatorily discharged Martha Arismendi and Jose Carbonell.

2. That at its work sit at Exxon-Linden the Respondent took the following actions in 1990, against employees because of discriminatory reasons:

(a) Suspended Samuel Johnson on July 18.
(b) Discharged Karen Talledo on August 29.
(c) Discharged Samuel Johnson on November 1.
(d) Discharged Maria Dias on November 1.
(e) Discharged Domitilla Olivares on November 8.

3. That since January 1, 1990, the Respondent has maintained in force and effect invalid no-solicitation and no-distribution rules.

4. That since April 1990 the Respondent by Supervisors Nelson Garcia and Jose Ormeno threatened employees if they wore union buttons.

5. That on or about May 1, 1990, the Respondent by Supervisors Joseph Salvatoriello and Jose Ormeno threatened employees with discharge unless they signed a statement that they had received ''Hazard Communication'' training.

6. That on or about July 18 and in late August 1990, the Respondent by Salvatoriello, prohibited an employees from wearing a sticker, which stated ''Lose Control.''

7. That in July 1990 the Respondent by Supervisors Jose Bolanos and Jose Ormeno threatened employees with unspecified reprisals if they supported the Union.

8. That in early September 1990 the Respondent by Supervisors Ormeno and Jose Diaz threatened employees with discharge if they spoke with union representatives.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

For some years, the Respondent maintained a collective-bargaining relationship with Service Employees International Union, Local 389 covering employees in separate units at various locations where the Respondent was engaged as a cleaning contractor. Among those locations were the two in volved in the present case, namely, Exxon-Florham Park and Exxon-Linden. On September 1, 1987, Local 389 merged into Local 3B-32J, Service Employees International Union, AFL–CIO and the Charging Party became the recognized bargaining agent.

In September 1988 the Respondent by its Attorney Joel Keiler entered into negotiations for successor agreements to replace a set of contracts the were due to expire in 1988 and 1989. Those negotiations stalled in 1988 and the Union did not attempt to revive them until November 1989.

In a case heard by me in April 1990 involving the same parties, JD (NY)–77–90, I made the following conclusions, which are pending before the Board on appeal:

1. That the Respondent violated Section 8(a)(5) of the Act by refusing to meet and bargain with the Union at reasonable times.

2. That the Respondent, in violation of Section 8(a)(5), refused to furnish relevant information requested by the Union in December 1988 and January and February 1989.

3. That the Respondent violated Section 8(a)(5) of the Act when on or about March 1, 1989, it withdrew recognition from the Union in various bargaining units.

4. That the Respondent violated Section 8(a)(1) and (5) of the Act by denying or causing the denial of access to the Union to certain of the Respondent's employees and by denying the Union access to seniority lists.

[1] Certain errors in the transcript are noted and corrected.

5. That the Respondent violated Section 8(a)(1) and (5) of the A by unilaterally reducing the wages and hours of the employees at the Exxon-Linden bargaining unit and by eliminating their medical insurance on July 1989.

6. That the Respondent violated Section 8(a)(1) and (3) of the Act by constructively discharging employees in the Exxon-Linden bargaining unit, on or about July 1, 1989.

7. That the Respondent violated Section 8(a)(1) of the Act by barring employees from wearing union insignia at the Exxon-Florham Park bargaining unit in December 1989.

8. That the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Luiza Bezerra on June 12, 1989, because of her membership in and/or activities on behalf of the Union.

In short, it is clear to me, based on the foregoing illegal conduct, that the Respondent has demonstrated antiunion animus.

As a consequence of an order issued on May 31, 1990, by a Federal District Court in 10(j) proceeding, the Respondent and the Union resumed bargaining. About the same time, the Union commenced a campaign to reintroduce itself to the employees of the Respondent. In the case of the employees at the two locations in the present case, this entailed organizing the employees anew as there were many new employees due to turnover.

B. *The Facts at Exxon-Florham Park-(Automatic Switch)*

Martha Arismendi testified that in February 1990 (after bargaining has ceased and before the 10(j) injunction had issued), Supervisor Gerado Castellani told a group of employees that there was no union. Arismendi testified that at some point between February and April 1990 she notified Castellani that she intended to file a grievance with the Union regarding a 1-day suspension that she received in February. It is asserted that by threatening to file a grievance, Arismendi indicated her continuing loyalty to the Union and manifested that loyalty to company management despite their contention that there was no union. Therefore, this piece of evidence was offered to show that when the Union began to reintroduce itself to the employees in late March 1990, it would be reasonable to conclude that the Respondent surmised that Arismendi would be one of the Union's supporters.

On or about March 24, 1990, Union Organizer Robert Sarason, managed to hold a meeting with about 18 to 20 people at the Exxon parking lot after work (about 9:30 p.m.). Among those present were Jose Carbonell and Mart Arismendi. While the meeting was in progress, Respondent's supervisor, Salvatore Toppi, and a security guard told the assembled group that they could not meet there and threatened to call the police. When the police arrived, the meeting broke up. (The eviction from the parking lot is not alleged as violation of the Act.)

Subsequent to the meeting held on March 24, Carbonell distributed copies of a union letter to other employees. This letter was a notice for a second meeting to be held on April 6, 1990.

A second union meeting with employees took place on Friday, April 6, 1990, at the parking lot. Martha Armendi and Jose Carbonell were latter employee was largely responsible for notifying other employees about the meeting. At this meeting, about 10 to 14 employees were present. Among other things, Carbonell was chosen as a leader and was delegated to go with group of employees to talk to management about a raise on Monday, April 9. (That date was postponed until Tuesday because of the absence of one of the employees.)

On Monday, April 9, 1990, Castellani told Arismendi and Carbonell to bring in their immigration papers on April 10. Further, the two employees were told that their papers had to be in their real names and not in the names that they were using on the job. Arismendi and Carbonell, as well as other employees, had been hired under names other than their own and had presented, with full knowledge of management, social security numbers or other identifying documents in order to avoid prohibitions on nondocumented aliens from doing work in the United States. Carbonell had been working under the name of Gilberto Caraballo and Arismendi had been working under name of Rosia Mora.

On Tuesday, April 10, 1990, when Carbonell and Arismendi tendered documents under their real names showing that they could legally work under the Immigration and Naturalization Service rules, they were told that the Company required such documents under their assumed names and that in the absence of such documents they could not be employed by the Respondent.

There is no doubt that the Company required Arismendi and Carbonell to furnish documents under their assumed names, knowing full well that such documents could not be produced even though both offered to produce documents showing that they could legally work in this country. In the case of another employee Ines Vergara, the evidence showed that when she was hired, the Company's supervisors were aware that she was using the name of another person and that when she obtained her ''Green Card,'' she changed her name of the Company's payroll and thereafter was employed under her real name.[2]

The Respondent does not contest the assertion that Carbonell and Arismendi were legally able to work in the United States as of April 1990. Tom Martin testified that in April 1990 someone named Martinez filed a lawsuit against the Company because, although he never worked for the Respondent, someone who had been employed by Control used his name and as a consequence the Internal Revenue Service listed money which he (the ''real'' Martinez) never earned from Control. Martin asserted that Martinez sought damages through his lawsuit. According to Martin, because of this lawsuit, he instructed supervisor Walter Solari to immediately check all current Immigration forms (I–9s) at the Automatic Switch and Sandoz worksites and discharge any and all employees using false names. Martin testified that this was the sequence of events leading to the discharges of Arismendi and Carbonell.[3] Martin denied that he was aware

[2] A very substantial percentage of the Company's work force consists of employees who were born in Spanish speaking countries. Based on the evidence received in this case, it is apparent that ln the past, when an undocumented alien applied for a job, he or she was told that in order to work, they had to use a different name and obtain identification of some person who was legally entitled to work in this country.

[3] The Respondent, in its brief, asserted that it had been sued by Martinez, an exemployee, because someone else used his social security number thereby causing him to have problems with the Inter-

that either of these two employees were involved in union activities.

In my opinion, the General Counsel pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), has made out a prima facie case that Arismendi and Carbonell were discharged because of their union activities. I note that the Respondent previously demonstrated its antiunion animus, its intention to oust the Union as the employees' bargaining representative, and its willingness to discharge employees to accomplish that result. I also note that the discharges of Arismendi and Carbonell occurred close in time to the Union's drive to reorganize the employees at Automatic Switch. Thus their discharge on April 10, 1990, came in close proximity to the two meetings held on March 24 and April 6. Carbonell was the employee most active in this campaign, urging his fellow employees to attend the April 6 meeting with the Union. He also was the employee designated by his coworkers to be their leader.

In *Darbar Indian Restaurant*, 288 NLRB 545 (1988), the Board stated:

> [T]he Respondent contends . . . that the General Counsel failed to establish that it had knowledge of Saha's union activities. Although there is no direct evidence of the Respondent's knowledge, we believe that the circumstances here support an inference of knowledge based . . . on the Respondent's general knowledge of union activity among the small group of seven dining room employees, the timing of the discharge, the contemporaneous 8(a)(1) conduct, the shifting and pretextual reasons asserted for discharge and the absence of any incident involving Saha or any conduct by him to explain his discharge on June 8.

The reason advanced by the Respondent to explain the discharges of Arismendi and Carbonell strikes me as being pretextual and/or unpersuasive.[4] First, although asserting that Martinez's lawsuit put in motion the events leading up to the discharges, the Respondent produced no documentation regarding this lawsuit.

Second, assuming that such a lawsuit had been filed and was not totally frivolous, I do not see why the discharge of employees who had been employed for many years would serve to cure the problem. For one thing, the evidence indicates that although Arismendi and Carbonell had been using false names, that situation had existed for a long time and was known to and indeed encouraged by the employer's supervision. That is, the evidence suggests that when some employe's were hired, they were told by Respondent's agents to use other people's names if they did not have the proper legal documentation. What is more, the two employees in question were perfectly willing to forgo the false names, use their real names and present documentation that they could legally work. Finally, the evidence shows that when other employees who had used false names obtained the necessary papers, they were allowed to continue to work while notifying the Company of their real names.

C. *The Events at Exxon-Linden*

1. The discharge of Karen Talledo

Karen Talledo began her employment at Exxon-Linden on April 16, 1990. She worked on the night shift as a cleaner. She was an active union supporter in that she attended union meetings, distributed union literature and buttons at or near the parking lot. Some of these activities were observed by company supervisors. She also attended in August, on behalf of the Union contract negotiations with Company Representative Joel Keiler. (Albeit, when asked at the meetings to identify the employees present, the Union refused to do so.)

On Monday, August 27, 1990, Talledo received a written warning because she left garbage near the elevator in her designated area. In accordance with the Respondent's progressive disciplinary procedure, the warning (which was dated Friday, August 24), stated that the next infraction would result a 3-day suspension. This was the first warning that Talledo had ever received. And in my opinion this warning was justified.

Notwithstanding the warning that a future infraction would lead to a suspension, Talledo was discharged on Wednesday, August 29, 1990, without any intervening disciplinary actions. In this regard, Respondent's witness Jose Diaz asserted that he discharged Talledo because she was not doing her job right and had no respect. He testified that after the warning noted above, he observed Talledo talking to another employee during working time (at 6 p.m. on Tuesday), and that when he checked her work area on Wednesday, it was ''not done so good.'' Thus, without taking any further disciplinary actions in accordance with the Company's progressive disciplinary procedure, Diaz as serts that he decided to terminate Talledo ''because she was not performing.'

Given the established antiunion animus, the evidence showing that management was aware of Talledo's union activities and the evidence showing that the decision to discharge her was taken in clear departure from Respondent's own disciplinary procedures, it seems to me that the General Counsel has established that Talledo's discharge was discriminatorily motivated.

The Respondent offered to prove that Talledo was a paid union agent at the time that she was employed by the Company. It offered to prove that as part of a union plan or conspiracy, Talledo left the garbage out on Friday evening with the intention that on Monday, it would be discovered by Samuel Johnson who would report it to Exxon in an effort to convince Exxon to cease doing business with Control. Inasmuch as the Respondent conceded that the information giv-

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nal Revenue Service. The brief also claimed that Control was being audited by the Immigration and Naturalization Service at its Gateway site. Respondent claimed that the ultimate reason that Arismendi and Carbonell were discharged was because they were using forged papers. As stated in Respondent's Brief, the ''General Counsel has attempted to make much of the fact that Arismendi and Carbonell were not illegal aliens. That misses the point. Their illegal status is not the issue. Their using false papers is the issue. Someone's W-2 form is going to show too much income because of (their) continuing to use false names even after they became legal aliens. Therefore, Control was at risk for another Martinez type lawsuit. Control, in order to protect itself, began policing the false names.''

[4] Under *Wright Line*, supra, once the General Counsel makes a prima facie showing to support an inference that protected conduct was a motivating factor in a discharge, the burden shifts to the employer to demonstrate ''by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.''

ing rise to this theory did not come tn its attention until well after Talledo was discharged, it could not and did not rely on these alleged facts in making its decision to fire her. Accordingly, I rejected the Respondent's offer of proof, holding that such evidence could not be relevant in this proceeding insofar as whether a violation of the Act occurred.

2. The suspension discharge of Samuel Johnson

Johnson admittedly was known to the Company as a union activist. Among other things he was elected as the day-shift shop steward in November 1989 and attended as part of the Union's committee, the contract negotiation held in August 1990.

In July 1990, Johnson helped distribute stickers saying ''Lose Control'' along with a leaflet of explanation. This leaflet stated:

> To all Exxon-Linden Employees
>
> LET'S LOSE CONTROL
>
> We all know Control Services is not going to change the way it treats the people who clean this facility. Health and safety violation, labor law violations and undignified treatment ar all that the cleaners can expect from Control at Exxon-Linden. We see only one solution.
>
> GET A FAIR CLEANING CONTRACTOR!
>
> Wear your sticker to demonstrate that everybody who works in this facility deserves to be treated as a human being. We thank you in advance.
>
> Tomorrow we ask all Exxon-Linden employees to show support for their cleaners by wearing the ''Lose Control'' stickers that we will be passing out at the gate.

On or about the morning of July 16, 1990, Johnson wore to work the ''Lose Control'' sticker. When he was asked by his supervisor, Joseph Salvatoriello to remove the sticker, Johnson refused. After consulting with the employer attorney, Mr. Salvatoriello told Johnson that if he did not remove the sticker he would have to leave work. When Johnson put the sticker on his boot, Salvatoriello ordered and escorted Johnson from the building. (There is no material dispute about this transaction.)[5]

In late October 1990 Johnson got sick and called in to inform the employer that he would not be in. Johnson testified that he called in early every morning that he was out. (He was out for about 7 to 9 days.) Since the Company requires employees to call in at least 2 hours before the start of their shift, and since Johnson's shift began at 8 a.m., there was no supervisor around to receive his calls and the messages were left on an answering machine.

Johnson received a mailgram dated November 1, 1990, notifying him that he was discharged because he had been excessively absent and had not called in nor been present on November 1.

Basically the Company asserts that it discharged Johnson because he broke a company rule requiring employees to call in when they are going to be absent. While acknowledging that Johnson did call in and report that he was sick on some of the days that he was out, the Company asserts that Johnson did not call in on other days, including November 1, 1990.

Supervisor Jose Bolanos testified that Johnson was out of 7 days in a row and that he did not call in on 3 of those days. Bolanos stated that on the third occasion (November 1, 1990) he notified his manager, Jose Ormeno, that Johnson had failed to call in. Ormeno testified that he transmitted this message to his superior, Joseph Salvatoriello, who in turn relayed the message to Thomas Martin, a vice president. According to Salvatoriello, he received a call from Ormeno that Johnson had not shown up or called, after which he called Martin for guidance because Johnson was a known union advocate. Salvatoriello and Martin both testified that Martin decided to discharge Johnson.

It was acknowledged by the Respondent's witness that they had in fact received a series of taped messages from Johnson stating that he was out sick. Nevertheless, despite being aware of his illness, Martin decided that Johnson's failure to call in on November 1, 1990, warranted discharge without making any attempted to contact Johnson to see what his problem was.

Salvatoriello testified that on November 1, 1990, Martin asked him to check the tape of the answering machine but that when he listened to it, the morning's messages had been erased. (Salvatoriello's explanation that messages are automatically erased after the tape is played and rewound is not how such machines work. Like any other tape recording device, erasures are only caused by recording over the old messages and are not not caused merely by rewinding the tape.)

Joseph Salvatoriello testified that he could not recall any occasion that an employee was discharged for a single no-call/no-show and Bolanos testified that it was not the Company's policy to discharge employees for a singe infraction. Further, I concluded in my prior decision that in the past, there have been occasions when employees of Respondent had not been discharged when they failed to call in when absent.

Finally, it is noted that a company memorandum in Johnson's personnel file indicates a completely different reason for his discharge; to wit that although Johnson called in, he failed to present a doctor's note explaining his illness. Yet such a note would not be required until an employee is ready to go back to work and none of the Respondent's witnesses testified that this was a reason for Johnson's discharge. (Incidently, Johnson did get a doctor's note which he was prepared to present to the Company on his return work.)

The General Counsel having made out a prima facie case of discrimination, it is my opinion that the Respondent has not met its burden of proving that its reason for discharging Johnson was for legitimate reasons unrelated to his union or protected concerted activities.

[5] The General Counsel contends that on other occasions, Johnson was threatened with discharge because he wore a pin saying ''SEIU Yes.'' She further contends that in May 1990 Johnson was threatened with discharge because he refused to sign a paper acknowledging that he had been given safety training. In my opinion Johnson's testimony on these issues was vague, unclear and contradictory. Moreover, his testimony, to a large extent was solicited through leading questions. See *H. C. Thomson, Inc*., 230 NLRB 808 fn. 2 (1979). I therefore do not place much reliance on such evidence and to this extent these allegations of the complaint are dismissed.

In relation to the ''Lose Control'' sticker I also conclude that the Respondent's 1-day suspension of Johnson was violative of Section 8(a)(1) and (3) of the Act. An employer may not prohibit employees from wearing union insignia in the work place absent some legitimate business concern or absent a showing that such badges, buttons or insignia contain messages that are vulgar, obscene or otherwise offensive. *NLRB v. Malta Construction Co*., 806 F.2d 1009 (11th Cir. 1986); *Cannon Industries*, 291 NLRB 632, 636 (1988); *Page Avjet Corp*., 275 NLRB 773 (1985); *Albertson's, Inc*., 272 NLRB 865 (1984); *Dixie Machine Rebuilders*, 248 NLRB 881, 882 (1980).

In the present case, the ''Lose Control'' sticker was distributed along with the leaflet described above and was therefore clearly connected to the Union's position vis a vis its labor dispute with the employer. In context, the message was essentially an appeal to Exxon to cease doing business with Control because of the labor dispute. While such a message would reasonably be expected to discomfort one's employer, it is a message which is protected in the context of a labor dispute. See, for example, *Professional Porter & Window Cleaning Co*., 263 NLRB 136, 139 (1982). In *Jefferson Standard Broadcasting Co*., 94 NLRB 1507 (1951), affd. sub nom. *NLRB v. Electrical Workers IBEW Local 1229*, 346 U.S. 464 (1953), the Board and the Court held that certain handbills distributed by employees to the public disparaged the employer's product and therefore were not pro tected by the Act because they ''deliberately undertook to alienate their employer's customers by impugning the technical quality of his product.'' However, in the same decision the Board went on to state:

> The Board has held that the Act protects employees against employer reprisal when they speak freely ''on organizational matters'' . . . and in one way or another denounce their employer for his conduct of labor relations or affairs germane to the employment relationship. Moreover, employees acting in concert may exhort consumers to refrain from purchasing their employer's product unless and until he alters his labor policy or practices. But this is a different case. Here the subject matter of the employees' verbal attack . . . was not related to their interests as employees. And the gist of their appeal to the public was that the employer ought to be boycotted because he offered a shoddy product . . . not because he was ''unfair'' to the employees who worked on that product.

As the ''Lose Control'' sticker must he viewed together with the leaflet with which it was distributed and in the context of the ongoing labor dispute between the parties it is my opinion that the Respondent would not legally prohibit Johnson from wearing it.

3. The discharge of Maria Dias

Dias had been working for the Respondent at the Exxon-Linden jobsite since 1982. She was employed as a cleaner and her hours were from 6 a.m. to 2:30 p.m. She was discharged on November 1, 1990, the same day that Samuel Johnson was discharged.

Dias was a member of the Union since 1982 and was very active on its behalf during the period immediately preceding her discharge. Company Vice President Thomas Martin concedes that he was aware that Dias was a union activist.

The Company asserts that it discharged Dias because she was caught in its office at the jobsite going through the desk of Supervisor George Bolanos. Joseph Salvatoriello testified that on or about October 30, 1990, he received a call from Jose Ormeno who told him that Dias was going through papers in Bolanos' desk. Nevertheless, the person who allegedly witnessed this event (Julio Lopez) testified that he only saw Dias at an open drawer in the desk and could not see what she was looking at or doing.

Because Dias' hours required her to be at the jobsite before any of the supervisors, an arrangement was made for her to have access to various keys. She testified that in September 1990 she had been given the key to Control's office by George Bolanos so that she did not have to go each day to the Exxon supervisor to have the office door opened. She also testified without contradiction that her normal procedure in October 1990 was that after signing in she would go to the desk in Control's office extract a set of keys which used while working to open closets, bathrooms, etc., on the first and second floors. Her uncontradicted testimony therefore established that Dias had a good reason to open the desk in the Control office.

As Dias needed to use the desk in Control's office to do her work and; the Respondent's eyewitness did not assert that he saw her going through or looking at any papers, it seems to me that the reason for her discharge can only be described as pretextual. Given the evidence showing antiunion animus and company knowledge of Dias' union activities, I conclude that her discharge was motivated by union considerations in violation of Section 8(a)(1) and (3) of the Act.

4. The discharge of Domitilla Olivares

Domitilla Olivares was hired to work at the Exxon-Linden jobsite in October 1989 and was assigned to work on the night shift. She testified the during her brief time at work, she signed a union card, wore a union button at work, and met with union organizers at the parking lot before and after work. She further testified that on or about November 6, 1990, she was observed by Supervisor Jose Diaz as she spoke to Talledo and Union Agents Sarason and Erem at the gate.

According to Olivares, on November 7, 1990, Supervisor Jose Ormeno called her a traitor. On the following day, Luis Duarte (essentially a lead person) conveyed a message from Ormeno that she was discharged. Olivares testified that Duarte said that he believed that her discharge was because the Union. (Duarte did not testify.)

Jose Diaz testified that Olivares who worked under his supervision was not doing her job well and that over a 1-month period, he recommended to Jose Ormeno that she be discharged on about three occasions. For his part, Ormeno asserted that although Diaz discharged Olivares he recommended that she be discharged on about three occasions.

According to Ormeno, he at first rejected Dias' recommendation because Olivares was a friend of his wife. Ormeno testified that when he found out that Olivares was telling his wife that he was fooling around, he decided to no longer protect Olivares and let Diaz discharge her. Although Ormeno admits that he told Olivares that she was a traitor,

he asserts that it was not intended in an antiunion context but was related to his marital relationship.

Notwithstanding the assertions by Dias and Ormeno that Olivares was not doing her job well, neither issued any warnings to her. Thus, despite the existence and application of a progressive disciplinary system, Olivares was discharged without prior warning.

In view of the evidence of antiunion animus and what appears to be a pretextual reason for her discharge, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act in relation to its discharge of Olivares.

D. *The No-Solicitation/No-Distribution Rules*

The Respondent concedes that a document entitled ''Safety, Security and Building Familiarization Requirements,'' has been in force and effect since 1982. This document contains the following rule at item 26: ''Soliciting is prohibited on ER&E premises by all Contractor's employees.''

The Respondent further concedes that another document entitled ''Rules Conduct,'' has been in force and effect for a similar period of time. This set of rules, which currently applies to all bargaining units which are represented by this union (including the two here) prohibits: ''Soliciting, collecting, or accepting contributions and/or distributing or collecting papers or material during work hours without approval.''

The rules described above in the ''Safety, Security and Building Familiarization Requirements,'' prohibits Control's employees from engaging in solicitation at any time and at any location on the premises of Control's customers. As such the rule, on its face, is presumptively unlawful under *Our Way, Inc*., 268 NLRB 394 (1983). See also *Southwest Gas Corp*., 283 NLRB 543, 546 (1987); and *Presbyterian/St. Luke's Medical Center v. NLRB*, 723 F.2d 1468 (10th Cir. 1983).

The no-solicitation and no-distribution rule contained in the ''Rules of Conduct'' are also, on their face, presumptively invalid. Thus, in *Beverly Enterprises*, 287 NLRB 158 fn. 2 (1987), the Board relying on *Our Way, Inc*., supra, held that although prohibitions solicitations on ''work time'' would presumptively illegal, such prohibitions during ''work hours'' would be presumptively illegal.

Since the rules described above are presumptively invalid, it was incumbent on the Respondent to demonstrate that their enforcement was justified some legitimate business justification. Thus, the Respondent could have, but did not, make an effort to show that such rules were necessary to maintain production or discipline or served some other legitimate purpose. *Southwest Gas Corp*., supra at 546.

The Respondent asserts that since these rules have been in effect for more than 6 months prior to the time the unfair labor practice charges were filed, no violation may be found pursuant to Section 10(b) of the Act.

In *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), the Supreme Court held that Section 10(b) of the Act barred an allegation that the Union's collective-bargaining agreement containing a union-security clause was unlawful because the union did not represent a majority at the time it was recognized by the Employer. The Court held that the allegation were barred because the conduct which had to be relied on to invalidate the contract (minority status at the time that the contract was made) occurred more than 6 months before the unfair labor practice charge was filed. The Court stated:

> [A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso.
>
> . . . .
>
> In any real sense, then, the complaints in this case are ''based upon'' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution.

On the other hand, the Court distinguished the facts in *Bryan Mfg. Co*., with other cases where Section 10(b) would not bar allegations relating to contract enforcement. Thus, the Court stated that Section 10(b) would not bar allegations in situations where an agreement was invalid on its face or ''one validly executed, but unlawfully administered.'' 362 U.S. at 423. In *Arvin Industries*, 285 NLRB 753 (1987), the Board concluded that where a superseniority clause was presumptively illegal on its face, such a clause may be found to be unlawfully maintained without finding that it had been unlawfully enforced. The Board concluded that even in the absence of evidence that such a claus had actually been enforced within the 10(b) period, the continued maintenance of such a clause would be deemed illegal even though enacted more than 6 months prior to the charge being filed. As explained by the Board, where a provision *on its face* is either unlawful or presumptively unlawful, the violation (maintenance of the illegal provision) is not ''based upon'' or ''inescapably grounded on'' events outside the 6-month 10(b) period.

As the present case involves a situation where two rules maintained by the Respondent are presumptively illegal under *Our Way, Inc*., supra, their continued maintenance is violative of the Act in the absence of any showing by the Respondent that the rules are necessary for some legitimate business purpose. Further, I conclude, based on the authority of *Arvin Industries*, and cases cited therein, that this allegation is not barred by the statute of limitations set forth in Section 10(b) of the Act.

CONCLUSIONS OF LAW

1. Control Services, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 32B-32J Service Employees International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By barring employees from wearing union insignia at the Exxon-Linden bargaining unit, the Respondent has violated Section 8(a)(1) of the Act.

4. By giving Samuel Johnson a 1-day suspension because he wore a ''Lose Control'' sticker, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By discharging Samuel Johnson, Karen Talledo, Maria Dias, Domitilla Olivares, Jose Carbonell, and Martha Arismendi because of their membership in or activities on behalf of the Union, the Respondent has violated Section 8(a)(1) and (3) of the Act.

6. By maintaining in force and effect rules prohibiting employees from engaging in union solicitations and distributions

during working hours or at any location on the premises of Control's customers, the Respondent has violated Section 8(a)(1) of the Act.

7. The Respondent has not violated the Act in any other manner encompassed by the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because the Respondent has a proclivity for violating the Act and because of the serious nature of the violations demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order, requiring the Respondent to cease and desist from infringing in any manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Control Services, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Barring employees from wearing union insignia.

(b) Suspending or otherwise discriminating against any employees because they wear union insignia.

(c) Discharging or otherwise discriminating against any employees because of their membership in or activities on behalf of the Union.

(d) Maintaining in force and effect rules prohibiting employees from engaging in union solicitations or distributions during working hours at any location on the premises of Control's customers.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Samuel Johnson, Karen Talledo, Maria Dias, Domitilla Olivares, Jose Carbonell, and Martha Arismendi immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities and jobsites at Florham Park and Exxon-Linden, copies of the attached notice marked ''Appendix [7] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT bar employees from wearing union insignia.

WE WILL NOT suspend or otherwise discriminate against any employees because they wear union insignia.

WE WILL NOT discharge or otherwise discriminate against any employees because of their membership in or activities on behalf of Local 32B-32J, Service Employees International Union, AFL–CIO.

WE WILL NOT maintain in force and effect rules prohibiting employees from engaging in union solicitations or distributions during working hours or at any location on the premises of Control's customers.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Samuel Johnson, Karen Talledo, Maria Dias, Domitilla Olivares, Jose Carhonell, and Martha Arismendi immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

WE WILL remove for our files any reference to the unlawful suspension and discharges and notify the employees in writing that this has been done and the discharges will not be used against them in any way.

CONTROL SERVICES, INC.